83-255

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

ALBERT B. BENSON AND VIKTOR E. BENSON,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented for Review.

1. Whether the doctrine of collateral estoppel bars the prosecution of the petitioners for the crime of conspiracy to commit arson where the Commonwealth, having no direct evidence of an agreement to commit arson, intends to prove a conspiracy to commit arson by introducing evidence substantially identical to that which resulted in petitioners' acquittals on the substantive charges of arson and breaking and entering with the intent to commit arson?

2. Whether, alternatively, the doctrine of collateral estoppel bars the relitigation at the trial of the conspiracy indictment of all facts and issues that, if believed by a jury, would necessarily tend to show that the petitioners committed the substantive offenses of arson and breaking and entering with intent to commit arson and which were necessarily determined against the Commonwealth by the prior acquittals of the petitioners?

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Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioners respectfully pray that a writ of certiorari issue to review the decree and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts entered in this proceeding on June 15, 1983.

Opinions Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 389 Mass. 473 (1983) and is set forth at page 1a in the appendix. The report of the trial court is set forth at page 48a in the appendix.

The petitioners' claims were presented in other state court proceedings below. The lower court opinions are not reported but are set forth at pages 11a, 26a, and 29a in the appendix.

The petitioners' claims were raised in the federal courts pursuant to 28 U.S.C. §§ 2241 and 2254, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). The opinion of the United States District Court for the District of Massachusetts is reported at 507 F. Supp. 975 (D. Mass. 1981) and is set forth at page 31a in the appendix. The opinion of the United States Court of Appeals for the First Circuit is reported at 663 F.2d 355 (1st Cir. 1981) and is set forth at page 39a in the appendix.

Jurisdiction.

The decree of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on June 15, 1983, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Invoked.

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Statement of the Case.

The petitioners, previously acquitted of the substantive offenses of arson and breaking and entering with intent to commit arson, now await trial on the charge of conspiracy to commit the very same arson.

The petitioners filed a motion to dismiss seeking to bar their prosecution on the conspiracy charge or, alternatively, to bar the relitigation of all facts and issues that were necessarily determined in their favor at the prior trial. The motion to dismiss was founded upon the doctrine of collateral estoppel as embodied in the double jeopardy clause of the Fifth Amendment (A. 86a). The trial court, stating that the claims were "both so important and so doubtful" as to require an appellate court's decision prior to trial, reserved and reported the case to the Massachusetts Appeals Court (A. 48a). The case was then transferred to the Supreme Judicial Court for direct appellate review by that court. The Supreme Judicial Court held that the doctrine of collateral estoppel did not bar the prosecution of the conspiracy charge or in any way limit the evidence the Commonwealth could introduce at the trial. The case was ordered to stand for trial (A. 1a).

The facts material to the consideration of the questions presented for review are as follows:

On the evening of December 20, 1978, Massachusetts State Police officers observed the petitioners, Albert B. Benson and Viktor E. Benson, enter a five-story commercial building in Boston, Massachusetts. The officers observed several other persons entering and exiting the building. The petitioners were arrested upon their departure from the building. Shortly thereafter, a fire erupted in an office on the second floor.

The petitioners were each indicted on January 11, 1979, on identical charges of (1) arson, (2) breaking and entering with intent to commit arson, and (3) conspiracy to commit arson.

The arson indictments in pertinent part state: "on December 20, 1978, did wilfully and maliciously cause to be burned, and did aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston . . ." (A. 54a, 55a).

The conspiracy to commit arson indictment in pertinent part states: "on December 20, 1978, and on divers and other dates, did conspire together to wilfully and maliciously cause to be burned, and did conspire together to aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston . . ." (A. 53a).

In pre-trial pleadings filed in the trial court, the Commonwealth has admitted that:

1. It has no direct evidence of a conspiracy to commit arson;
2. It has no direct evidence of a conspiracy existing on any date other than on December 20, 1978;
3. It has no statements to support an agreement to commit arson;
4. It is unable to specify the names of any co-conspirators;
5. The acts in furtherance of the conspiracy were that on December 20, 1978, the defendants did enter 101-109 State Street, Boston, and did aid, counsel, procure and cause that building to burn (A. 62a, 64a).

A trial was commenced on the indictments charging arson and breaking with intent to commit arson on September 11, 1979.[1] The petitioners were acquitted on each such indictment.

The petitioners filed a motion to dismiss the remaining conspiracy indictment. After a hearing, the trial court denied the

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[1] At the time, the Commonwealth was statutorily prohibited from trying the substantive crimes at the same time it tried the defendants for conspiracy to commit the same substantive offenses. Mass.G.L. c. 278, § 2A, repealed by St. 1979, c. 344, § 43 (A. 99a).

motion, based in part on numerous representations by the Commonwealth that additional evidence of a common scheme would be introduced against the petitioners in the trial on the conspiracy indictment (A. 11a).

In March, 1980, the Commonwealth made its sole attempt to supplement its pre-trial pleadings on the issue of the additional evidence to be introduced in support of the conspiracy indictment. At that time, the Commonwealth indicated that it intended to introduce evidence of three other fires and the alleged involvement of the petitioners therein. In response, the petitioners successfully moved for an order barring the Commonwealth from introducing such evidence (A. 4a).

The petitioners filed a motion *in limine* seeking to preclude the Commonwealth from relitigating at the conspiracy trial all facts and issues necessarily determined against it by the acquittal of the petitioners on the indictments which charged them with arson and breaking and entering with intent to commit arson. The petitioners also filed a renewed motion to dismiss.[2] On June 23, 1980, both motions, grounded upon the doctrine of collateral estoppel, were denied without prejudice to the petitioners' right to renew their contentions during the course of trial proceedings (A. 26a).

The petitioners then filed an application for leave to file an interlocutory appeal in the Supreme Judicial Court of Massa-

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[2] At the court's request, the Commonwealth filed a trial memorandum which the court treated as a summary of the evidence which the Commonwealth intends to introduce at the trial on the conspiracy indictment (A. 82a). That memorandum together with the Commonwealth's pleading of March 14, 1980, which the court had held to contain inadmissible evidence constitute the *only* two documents of record which even arguably suggest the nature of the evidence to be introduced by the Commonwealth at the conspiracy trial. In addition, counsel of record for the petitioner Albert B. Benson filed an affidavit which recited the evidence which the petitioners believed the Commonwealth would introduce at trial. The trial court treated that affidavit as a more precise recitation of the proposed testimony of the Commonwealth's witnesses (A. 72a).

chusetts. After a hearing on September 24, 1980, the application was denied without prejudice to the petitioners' right to renew their contentions during the course of the trial proceedings (A. 29a).

The petitioners then filed a two-count complaint in the United States District Court for the District of Massachusetts. Count I was a petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254, and Count II consisted of a complaint for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). Both claims were grounded on the claim of collateral estoppel.

While the district court did conclude that the petitioners had exhausted their state remedies, it denied their petition for habeas corpus and complaint for injunctive relief (A. 31a). However, the district court did rule that: "the Commonwealth will be foreclosed from claiming or arguing that the petitioners set the fire in the building or that they did aid, counsel or procure the burning of the building . . ." (A. 37a).

On appeal,[3] the United States Circuit Court of Appeals for the First Circuit vacated in part and affirmed in part the decision of the district court (A. 39a). That portion of the district court's decision which foreclosed the Commonwealth from offering specific evidence at trial was vacated. That portion of the district court's decision which denied the writ of habeas corpus was affirmed, the court holding that the petitioners had not exhausted their stated remedies.[4]

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[3] A certificate of probable cause was issued by the district court pursuant to 28 U.S.C. § 2253, Rule 22 of the Federal Rules of Appellate Procedure, and Rule 17 (Habeas Corpus) of the Rules of the United States Court of Appeals for the First Circuit.

[4] The court stated in relevant part that:

> There can be no question here that the application for leave to file a petition for interlocutory appeal did not raise precisely the same issue presented in this petition for a writ of habeas corpus. Despite the wording of the Massachusetts Rules of Criminal Procedure which ex-

The petitioners then filed a petition for relief by the Supreme Judicial Court pursuant to its supervisory powers contained in Mass.G.L. c. 211, § 3. After a hearing, a single justice continued the action, pending the filing of a motion in the trial court to reserve and report a motion to dismiss. On May 17, 1982, the petitioners filed with the trial court a motion to dismiss and the case was reserved and reported by the trial court on July 17, 1982 (A. 48a).

The Supreme Judicial Court held that "the principles of collateral estoppel are inapplicable to the evidentiary facts of the prior trial because of the tenuous and speculative relationship between the result in the prior proceeding and the evidence proposed to be presented in the subsequent prosecution" (A. 9a).

The petitioners seek to have the validity of the Supreme Judicial Court's decision reviewed by this Court.

Reasons for Granting the Writ.

I. The Decision of the Supreme Judicial Court for the Commonwealth of Massachusetts is in Conflict with the Applicable Decisions of the Supreme Court.

The petitioners argued below that, having been acquitted previously on the substantive charges of arson and of breaking

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plicitly recognize interlocutory appeal only for decisions on suppression motions, appellants could — and still can — appeal to the Massachusetts Supreme Judicial Court under its supervisory power. *See Mass. Gen. Laws* ch. 211 § 3; *Fadden* v. *Commonwealth*, 376 Mass. 604, 382 N.E.2d 1054, 1056 (Mass. 1978). We therefore find that the unusual circumstances justifying jurisdiction over a pre-trial petition for a writ of habeas corpus do not exist in this instance.

663 F.2d at 359.

and entering with the intent to commit arson, the doctrine of collateral estoppel bars their prosecution for the crime of conspiracy to commit arson in that in each case the core of the prosecutor's case is the same. The Supreme Judicial Court's decision that the doctrine of collateral estoppel is not applicable to the within action "because of the tenuous and speculative relationship between the result in the prior proceeding and the evidence proposed to be presented in the subsequent prosecution . . ." is not in conformity with the principles enunciated by this Court in *Sealfon* v. *United States*, 332 U.S. 575 (1947) and *Ashe* v. *Swenson*, 397 U.S. 436 (1970). See also *Harris* v. *Washington*, 404 U.S. 55 (1971); *Turner* v. *Arkansas*, 407 U.S. 364 (1972); and *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961).

The Supreme Judicial Court held that the general verdicts of not guilty returned by the jurors at the trial of the substantive offenses made it impossible to determine with certainty what the jury in the earlier prosecution had decided. The court suggested that the jurors "may have acquitted the [petitioners] because they concluded that the fire was not set or because they concluded that there was no active participation by the [petitioners] with the person who set the fire" (A. 9a).

This reasoning is not in accord with the evidence presented at the prior trial nor with the admissions set forth by the Commonwealth in its pre-trial pleadings on the conspiracy indictment.

The petitioners did not testify nor did they produce any defense witnesses at the prior trial.[5] The Commonwealth introduced uncontroverted testimony that the fire was indeed set. A state trooper testified that the building had a strong chemical odor immediately subsequent to the fire (A. 75a). A state

[5] Through cross-examination, the petitioners showed that they had been employed to perform construction work on the premises and that their presence in the building was lawful and within the scope of that employment.

police chemist testified that a flammable liquid, denatured alcohol, was found to be present in carpeting samples taken from the scene of the fire. Finally, in the opinion of a deputy chief and the chief of the Boston Fire Department, the fire was of incendiary origin (A. 76a, 85a).

Thus, for the Supreme Judicial Court to suggest that the jurors may have concluded that the fire was not set, clearly indicates not merely that its inquiry into petitioners' claims was not "set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *Sealfon* v. *United States*, *supra*, quoted in *Ashe* v. *Swenson*, *supra* at 444, but that its opinion is based on a misreading of the record.[6]

The Supreme Judicial Court's only other rationale for concluding that the jury may have reached its decision rationally on some issue of ultimate fact other than that the petitioners were not in any way responsible for the fire, was that the jury may have concluded that there was no active participation by the petitioners with the person who set the fire. Again, the Supreme Judicial Court has misread the record.

The Commonwealth made no attempt at the prior trial to prove that an accomplice was present at the scene of the fire and the Commonwealth did not advance that theory to the jury during its closing argument (A. 117a). The Commonwealth's pre-trial pleadings disclose that it possesses no evidence to suggest the existence of any accomplices and that the Commonwealth cannot identify any co-conspirators other than the petitioners (A. 62a). The Commonwealth's most recent statement of the evidence it expects to introduce in support of the conspiracy indictment, given more than three and

[6] See Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 39 (1960), wherein the authors state that "if a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering." *Ashe*, *supra* at 445 n.9.

one-half years following the return of that indictment, makes no reference to an accomplice (A. 96a). To the contrary, the Commonwealth intends to show that all of the other persons present at the scene of the fire did not set the fire (A. 85a). The Commonwealth does not now nor has it ever contended some person or persons other than the petitioners set the fire. Thus the jury could not possibly have based its verdict on the premise that the petitioners aided, counseled or procured someone else to set the fire.

Accordingly, the Supreme Judicial Court has failed to properly examine all of the evidence and pleadings and other relevant material in the prior proceeding. See *Ashe*, *supra* at 444. Its decision should therefore be reversed.

II. The Doctrine of Collateral Estoppel Bars the Petitioners' Prosecution on the Charge of Conspiracy to Commit Arson Because the Core of the Prosecutors' Case is the Same as That Presented in the Previous Trial on the Charges of Arson and Breaking and Entering with Intent to Commit Arson.

This Court has long held that the doctrine of collateral estoppel may totally bar a subsequent prosecution of an offense separate and distinct from an offense prosecuted at a prior trial. *Sealfon* v. *United States*, *supra*. In *Sealfon*, this Court held that the acquittal of the defendant on the charge of conspiracy to defraud the United States government barred any subsequent attempt by the prosecution to prove that the defendant committed the substantive offense due to its practical and pragmatic determination that "*the core of the prosecutor's case was in each case the same.*" *Id.* at 580 (emphasis added).

As Judge Friendly, in a Second Circuit opinion in *United States* v. *Kramer*, *supra*, stated:

> The Government is free, within the limits set by the Fifth Amendment . . . to charge an acquitted Defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it at the first trial, no matter how unreasonable the Government may consider that determination to be.

Id. at 916.

The Supreme Judicial Court's decision in this case is in direct contravention of *Sealfon*, *Ashe* and *Kramer*. The court has cleared the way for the Commonwealth to prosecute the conspiracy by proving that the petitioners, to the exclusion of all other persons in the building (A. 85a), were the only persons who could have set the fire. This very fact, the identity of the arsonists, was necessarily determined adversely to the Commonwealth at the first trial.

In *Harris* v. *Washington*, *supra*, this Court held that where "the ultimate issue of identity . . ." was decided by the jury in the first trial, that issue could not be repudiated in a subsequent trial "irrespective of whether the jury considered all relevant evidence and irrespective of the good faith of the state in bringing successive prosecutions." *Id.* at 56-57. Similarly, in the case at bar, the Commonwealth cannot attempt to prove a conspiracy to commit arson by requiring the jurors to infer that the petitioners set the fire.

In *United States* v. *Kramer*, *supra*, the Second Circuit found that the government's evidence in the second trial was substantially identical to that introduced at the first trial where the defendant was acquitted of the substantive offenses of burglary. The court reversed defendant's subsequent convictions for conspiracy to commit the very same burglaries and directed the entry of judgment of acquittal. The directed judgment of acquittal was required because the subsequent prosecution was based on evidence that "would necessarily tend to show

the defendant was a principal or aider or abetter to the charges charged in the first trial." *Id.* at 915. In accord, *United States* v. *Mock*, 604 F.2d 341 (5th Cir. 1979); *Wingate* v. *Wainwright*, 464 F.2d 209 (5th Cir. 1972); *United States* v. *Larkin*, 605 F.2d 1360 (5th Cir. 1979), *reheard*, 611 F.2d 585 (5th Cir. 1980); and *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980).

In *Turner* v. *Arkansas*, *supra*, this Court held that the jury's acquittal of the defendant on a charge of felony murder at the first trial precluded "the possibility of a constitutionally valid conviction for . . . robbery" at a subsequent trial. *Id.* at 369.[7] In *Turner*, the government stipulated that its evidence would be identical with that it introduced at the first trial. Similarly, the Commonwealth's trial memorandum and oral statement to the court below show that the Commonwealth intends to introduce substantially the same evidence at the second trial as was introduced at the first trial.

In the case at bar, it was conclusively established that the petitioners did not set the fire or aid, counsel and procure the burning of the building. The doctrine of collateral estoppel is applicable herein and necessarily precludes the Commonwealth from attempting to prove a conspiracy by relitigating the actions of petitioners on December 20, 1978 at 101-109 State Street. The Supreme Judicial Court's failure to properly review the case below under the *Sealfon* and *Ashe* guidelines was error.

III. The Commonwealth of Massachusetts is Collaterally Estopped from Relitigating Those Facts and Issues Which were Necessarily Determined Against it at the Petitioners' Prior Trial.

Inasmuch as the Commonwealth has conceded that it possesses no direct evidence of a conspiracy and that it cannot

[7] In *Turner*, as in the case at bar, the prosecution was statutorily prohibited from trying all pending charges in a single proceeding. See footnote 1, *supra*.

identify persons who acted in concert with the petitioners (A. 64a), the Commonwealth must necessarily seek to convince a jury that the petitioners were in some way responsible for the incendiary fire which occurred on December 20, 1978. The Commonwealth will thus seek to relitigate the issue of the identity of the person or persons who set that fire, an issue which has already been conclusively determined against the Commonwealth in the prior trial. This procedure would clearly violate the teachings of *Ashe*.

Absent a constitutional impediment arising from a prior acquittal on a substantive offense, the Commonwealth may properly attempt to prove an agreement to commit a crime by proving that the crime itself was committed or that acts were taken towards its commission. *Attorney General* v. *Tufts*, 239 Mass. 458 (1921). The Commonwealth's hope in this case would be that the jury will infer the existence of an agreement to commit arson from the commission of the underlying substantive offense of arson. This is a widely used and perfectly permissible trial tactic in the Commonwealth. See, e.g., *Commonwealth* v. *Shea*, 323 Mass. 406 (1948); *Commonwealth* v. *Binkiewicz*, 342 Mass. 740 (1961); *Commonwealth* v. *Meserve*, 154 Mass. 64 (1891).

The principal reason for the use of such inferential evidence is that the prosecution, due to the nature of the crime of conspiracy, rarely possesses direct evidence of the illegal agreement. Accordingly, the common purpose is often inferred from concerted action leading to a definite end, *Attorney General* v. *Tufts*, *supra*.

In the case at bar, however, the jury in the first trial determined that the petitioners did not commit the arson which is the stated objective of the alleged conspiracy. The Supreme Judicial Court concedes this point when it suggests that someone other than the petitioners actually set the fire (A. 9a). The Commonwealth has represented to the trial court that it cannot

identify any persons who acted in concert with the petitioners nor can it show any acts of the petitioners in furtherance of the conspiracy other than that the petitioners "did aid, counsel, procure and cause [the] building to burn" (A. 62a). Additional evidence enumerated by the Commonwealth in its trial memorandum (A. 82a), focuses on the identity of the petitioners as the persons who set the fire and their possible motives for doing so. The Commonwealth will also attempt to prove that all of the other occupants of the building on the evening of December 20, 1978 are innocent of setting the fire (A. 85a). The inevitable inference from all of the evidence which the Commonwealth has represented that it will introduce is that the petitioners set the fire.

To grant the Commonwealth an opportunity to relitigate these facts, thereby conceding that the previous adjudication was merely a dry-run, would be squarely contrary to the mandates of this Court set forth in *Sealfon* and *Ashe*.

The core of the Commonwealth's case in both trials will be the same; the Commonwealth will be re-trying the substantive offenses under the nominal rubric of a conspiracy indictment seeking to establish the existence of a conspiracy by proving the commission of the underlying substantive offense. This, the Commonwealth may not do without undermining the fundamental rights secured to the petitioners by the doctrine of collateral estoppel as embodied in the double jeopardy clause of the Fifth Amendment.

Conclusion.

For the reasons set forth herein, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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